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September 14, 1999

Mr. Rick Breitenbach
CALFED Bay-Delta Program
1416 Ninth Street, Suite 1155
Sacramento, CA 95814

Re: Comments of the Water Advisory Committee of Orange
County to the June 1999 Draft EIS/EIR for the CALFED
Bay-Delta Program

Dear Mr. Breitenbach:

We represent the Water Advisory Committee of Orange County ("WACO"). This letter serves as WACO's questions and comments on the legal adequacy of CALFED's June 1999 Bay-Delta Program Draft Programmatic Environmental Impact Statement/Environmental Impact Report ("EIS/EIR").

WACO appreciates the opportunity to comment on the document. WACO's comments about the technical and operational issues discussed in the EIS/EIR will be submitted separately.

WACO requests that all of its comments be included in the Record of Decision ("ROD"). WACO further requests that, in responding to WACO's legal comments on the EIS/EIR, CALFED should quote and respond to each of WACO's comments, rather than summarizing them.

Sincerely,

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Susan M. Trager

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Enclosure

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Legal Comments of the
Water Advisory Committee of Orange County
to the June 1999
Draft EIS/EIR for the
CALFED Bay-Delta Program

Prepared by

Susan M. Trager
September 14, 1999

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I. Introduction.

The Water Advisory Committee of Orange County ("WACO") is an association of public, private, not-for-profit and investor-owned utilities which collectively furnish water services to approximately 2.7 million people in Orange County, and San Diego County, California. WACO members rely on 275,000 acre-feet annually ("AFA") of imported water from foreign watersheds, of which 60,000 AFA is imported water from the State Water Project ("SWP").

Waco's technical comments on the CALFED's June 1999 Bay-Delta Program Draft Programmatic Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") are to be submitted under separate cover, and are incorporated by reference.

A. WACO members use SWP water to remedy local supply deficiencies and local water quality problems.

WACO members are water suppliers and water managers with decades of experience implementing the activities described in the EIS/EIR as possible "mitigation measures" to offset the adverse impacts of CALFED's so-called projects. Those activities (either expressly called for or impliedly required if the EIS/EIR is approved) have been in practice in the WACO service area for decades.

WACO members use the SWP water to remedy local water supply shortages and to mitigate local water source quality problems. SWP water provides the reliability to local water resources upon which the local community depends. The entire economy of the WACO service area depends on SWP water's continued reliability in terms of both quantity and quality. Many new and established commercial and industrial enterprises, many environmental projects/areas, and tens of thousands of residential housing units have been approved by local municipalities based upon their reasonable projections of the continued reliability of the SWP supply:

- The Urban Water Management Plans prepared and submitted by WACO's member agencies rely upon given assumptions about the reliability of the SWP supply and water quality assurances.
- Infrastructure in the WACO service area was built on certain assumptions expressed in the Legislative act giving birth to the SWP. Voters approved the bonded

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indebtedness to pay for the SWP. Debt was incurred based upon those assumptions.

- cities, counties and water suppliers have counted on the continued reliability of SWP water in analyzing the availability of water supplies to serve new projects pursuant to the requirements of Public Resources Code section 21151.9 and Water Code sections 10910 and 10911.

The CALFED project would result in a substantial diminution of SWP water exports upon which all plans for local supply reliability and quality depend. According to these existing plans, the significant diminution of SWP water supplies proposed by CALFED's so-called plan will result in inadequate local water supplies to serve the existing and planned water demands of our local community. If these resulting impacts are not fully mitigated as part of CALFED's so-called project, there will be significant adverse public health, economic, and environmental consequences throughout the WACO service area.

The experiences and daily operations of WACO members include the broadest range of water management activities, including: groundwater basin management; clean up of contaminated groundwater plumes; construction and operation of groundwater desalters; development and maintenance of habitat conservation plans; construction, operation and management of seawater intrusion barriers using recycled water in the injection wells to keep seawater out of the Orange County groundwater basin; operation of wastewater recycling plants and integration of recycled water into the local water supply¹; and conjunctive use of groundwater and surface water in both drought and normal water years.

For decades, WACO members have participated and funded regional water resources management institutions on the Santa Ana River. WACO members have spent millions of dollars in cooperatively building the institutional arrangements to manage the available water resources together with the upstream users of

¹A major 100 mgd wastewater purification facility is in the planning stages now. Two wastewater recycling plants have operated in Orange County for decades. Recycled water has already been integrated into WACO's supply sources, and WACO members' storage, treatment and distribution systems have already been built to accommodate the use of recycled water.

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the most significant local native resource: the Santa Ana River and its basin.

B. WACO members' relationship to the Metropolitan Water District of Southern California.

Five WACO members are members of the Metropolitan Water District of Southern California ("MWD"), including Anaheim, Fullerton, Santa Ana, Coastal Municipal Water District, and the Municipal Water District of Orange County.²

II. Summary of Reasons Why the EIS/EIR is Inadequate.

In summary, the EIS/EIR falls far short of the minimum legal requirements of a programmatic environmental study, both under the National Environmental Policy Act of 1969, 42 U.S.C.A. §4332, et. seq. ("NEPA"), and the California Environmental Quality Act of 1970, California Public Resources Code Section 21000, et seq. ("CEQA"). The document is not an EIS/EIS at all. It lacks the basic analytic structure of an EIS/EIR.

To agencies and their engineers and lawyers who routinely undertake the activities described in this EIS/EIR, its faulty assumptions, and its glossed-over treatment of the adverse consequences of this so-called project (to the extent one is described) are immediately apparent. Even for a broad-brush programmatic EIS/EIR, this document does not meet the threshold of legal adequacy. Seemingly drafted by a committee too skittish to admit in print its true goals and objectives, the only fact that is plain is that this document is 80% too long.

At the core of its inadequacy is the fact that it serves as more of a schematic for a political deal, than as an informational document to inform the public and decision makers about the environmental implications of a project. Specifically, the underlying analytical structure of the EIS/EIR is flawed because: (1) the EIS/EIR fails to provide an accurate, stable, and finite project description; (2) no meaningful analysis of adverse impacts is undertaken; (3) possible mitigation measures are only vaguely defined; (4) discussion of more detailed, enforceable mitigation measures is impermissibly deferred until after the project is commenced; and (5) portions of the EIS/EIR have not even been circulated for public comment. Both NEPA and CEQA require that key elements of a proposed project be analyzed,

²These comments are developed and submitted independently from those of MWD.

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and that the analysis be presented in the form of an EIS/EIR for review by the decision makers before a decision is made. The preparation and presentation of a "menu" or "matrix" of possible projects, possible alternatives, and possible mitigation measures from which the decision-makers pick and choose, does not suffice as an EIS/EIR. NEPA and CEQA are not restaurants, and an EIS/EIR is not a menu. An EIS/EIR is to be an information document about a project, its alternatives, its adverse impacts, and a range of mitigation measures to offset the adverse impacts.

None of the suggested, hypothetical mitigation measures is spelled out for incorporation into the project, so no mitigation will be approved even if a project is approved. Hence, none of the water supply needs of the WACO members can be met in this process.

Most importantly, as currently drafted, the EIS/EIR cannot withstand judicial scrutiny in either Federal or state court. Consequently, as the framework of the study is fatally flawed, it must be rebuilt from the foundation and recirculated for public review and comment.

WACO hopes that in its next iteration, the EIS/EIR will actually define a project and project alternatives, honestly describe the adverse impacts that may result from the project, and formulate and incorporate reasonable, feasible mitigation measures.

III. Deficiencies in the EIS/EIR.

The project description in the EIS/EIR is vague rather than finite, and it is misleading in that it avoids spelling out what the project is, what the alternatives are, and what feasible mitigation measures are available to offset the adverse impacts. Instead, this EIS/EIR impermissibly examines a "project description," and then "alternative descriptions" rather than "alternatives to the project," because the project description is neither a project nor a description. The EIS/EIR presents a "summary of environmental consequences" and no mitigation measures. Moreover, the EIS/EIR examines only the consequences of the purported project in the project area, rather than where the impacts would occur.

In light of the State's population projections, existing plans to supply water, existing and anticipated water quality regulations, and proposed and likely new listings of endangered species and critical habitat, this EIS/EIR wholly avoids the

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critical environmental analysis which must be undertaken to examine the project as a whole, including its cumulative impacts.

In its circuitous effort to avoid defining a project, the EIS/EIR also avoids identifying each of the agencies and each of the agency actions which will be required to carry out the purported project, its alternatives, and its mitigation measures. Because the tasks which must be done are not identified, the EIS/EIR avoids examining or even identifying each of the permits, permit amendments, licenses, license modifications, restrictions on exercise of water rights, the permits, licenses, and conditions which will be imposed on the resulting changed operations of other facilities, and impacts to public health.

The incomplete and misleading description of the so-called project results in fatal confusion as to which proposed impact-offsetting activities are mitigation measures, and which are alternatives.

A. The project description is inadequate.

"An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient environmental impact report". *Inyo County v. City of Los Angeles* (1977), 71 Cal.App.3d 185, 193, 139 Cal.Rptr. 396, 401. The appellate court in that case rejected Los Angeles' EIR for the same defect that the EIS/EIR suffers: a distorted project description. In that case, the court held:

The EIR is the heart of the environmental control process. (*County of Inyo v. Yorty*, supra, 32 Cal.App.3d at p. 810, 108 Cal.Rptr 377). CEQA describes the report's purpose - - to provide the public and governmental decision-makers (here, the Board of Water and Power Commissioners) with detailed information of the project's likely effect on the environment; to describe ways of minimizing significant effects; to point out alternatives to the project. (§§21002.1, 21061, 21100; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 263, 104 Cal.Rptr. 761...)

The EIR process facilitates CEQA's policy of supplying citizen input ... By depicting the project's unavoidable effects, mitigation measures and alternatives, the report

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furnishes the decision-maker information enabling it to balance the project's benefit against environmental cost. ... [citations omitted] The report should function as an environmental "alarm bell". (*County of Inyo v. Yorty*, supra, 32 Cal.App.3d at p. 810, 108 Cal.Rptr. 377).

... The CEQA Guidelines flesh out the "project" concept, by referring to it as "the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately. ..." (Cal.Admin.Code, tit. 14, §15037, subd. (a)) *County of Inyo v. Yorty*, supra, 71 Cal.App.3d 190, 192.

More recently, in *Stanislaus Natural Heritage Project v. County of Stanislaus* (*Diablo Grande Ltd.*, real party) ((1996)48 Cal.App.4th 182, mod. on den. of reh. Aug.8,1996; rev. den. Nov. 13, 1996, the court of appeal for the Fifth District held:

The County in essence approved an EIR for a 25-year project when water for the project had not been assured beyond the first 5 years of the 15-year first phase of the project. The County knew neither the source of the water the project would use beyond the first five years, nor what significant environmental effects might be expected when the as yet unknown water source (or sources) is ultimately used.

In our view, the County's approval of the project under these circumstances defeated a fundamental purpose of CEQA: to "inform the public and responsible officials of the environmental consequences of their decisions before they are made." ... The CEQA EIR process "protects not only the environment but also informed self-government." [citations omitted]

Stanislaus, supra, 48 Cal.App. 4th 193, 194-196.

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1. The project description is vague.

It is unclear just what project is being approved, what project is being studied, who would be approving this project or certifying the EIS/EIR as complete, and who would be implementing the project. The purported project has been described variously in the EIR/EIS as:

- ecosystem restoration plan;
- water quality program plan;
- water use efficiency program plan;
- water transfer program plan;
- long term levee program plan;
- watershed program plan;
- implementation plan;
- multi-species conservation strategy; and
- comprehensive monitoring, assessment, and research program.

Even after CALFED's second attempt at drafting an EIS/EIR over a period of many years and at a reported cost of \$30,000,000, the EIS/EIR is unclear as to what the actual project is. It appears that the core of the project being touted in this effort is "Delta habitat restoration." The other verbiage included in the EIS/EIR, which masquerades as tiering or later projects, only obfuscates whatever is the core project. The EIS/EIR is nothing short of misleading the affected public, which has been told repeatedly about the other elements allegedly being included in the CALFED project, which other elements might benefit them and mitigate against adverse water supply and other environmental impacts they will suffer if CALFED's core plan is ever approved.

The description of the so-called project in this EIS/EIR is not accurate, stable or finite. In fact, the project description is so distorted and vague that it fails to meet the core purpose of NEPA and CEQA: to inform the affected public and the decision makers about what the project is, and enabling them to balance the project's benefit against environmental cost. That cannot be done based upon the information in the EIS/EIR.

2. Bigger is not better; in the case of this EIS/EIR, it is worse.

CALFED has spent tens of thousands of dollars in public relations, plus a reported \$30,000,000 preparing a 24-inch thick collection of documents which purport to study and report on the adverse environmental impacts likely to result from a

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purportedly multi-phased project never described the same way twice in the EIS/EIR.

Yet even assuming that the project being examined is Bay-Delta habitat restoration, the EIS/EIR fails to disclose basic aspects of that project, including the fact that its implementation (with mitigation measures to be formulated some day perhaps), will, in some years, cut off almost all SWP water to Orange County. Imported water supplements local water resources in Southern California and is blended with Colorado River Water as necessary to maintain a reliable, safe, and adequate water supply.

A careful, non-technical reader will be uninformed that until such time as mitigation measures are implemented to assure water quality in the export area, the quality of the region's water supplies (including SWP water quality) will decline. The proposed restoration of wetlands through the CALFED Ecosystem Restoration Program may increase the amount of total organic carbon ("TOC") at drinking water intakes, increasing the potential to form disinfection by-products ("DBP"). Changing channel flows and increasing the amount of tidal waters exchanged with the estuary may increase the amount of bromide in Delta waters, significantly increasing DBP formation.

But one would have to wade through a stack 24 inches thick to learn this. Bigger is not better in this case. These impacts are mentioned in the 24-inch document, but they require independent technical analysis to learn of the possible impacts. Insufficient data is furnished to evaluate the seriousness of the impacts.

3. The project description spins "Warm and Fuzzy", while the reality of the true project is harsh and costly.

The project description in this EIS/EIR reads more like a press release in showcasing the "warm and fuzzy" aspects of an attempted environmental rescue, rather than a description to inform decision makers and the affected public. As such, it is fatally defective in the face of NEPA and CEQA requirements.

4. Dependence on recycled water and conservation is the pervasive theme.

To any water resources professional with any operations background, experience or training, the underlying

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theme of the EIS/EIR is let urban areas find a solution in increased water efficiency measures and water reuse.

There is no doubt that implementation of the purported project will be far more sweeping in scope, impact, and cost to humans and environment in the export area than the description given a broad-brush moniker in the EIS/EIR.

5. The drafters of this EIS/EIR have ignored 26 years of CEQA and NEPA case law involving water.

Significantly, the cases which analyze the adequacy of environmental documents about the expansion of Los Angeles' Owens Valley and Mono Lake water transfer facilities, and which rejects a program EIR on a proposed planned destination resort and 5000-unit residential subdivision on a 29,500 acre Stanislaus County parcel without an adequate or identifiable water supply, provide the greatest guidance as to why this EIS/EIR is inadequate. See, *County of Inyo v. Yorty*, (1973) 32 Cal.App.3d 793; *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, mod. on den. of rehrg July 25, 1977, hrg. den. October 6, 1977; and *Stanislaus Natural Heritage Project v. County of Stanislaus (Diablo Grande Ltd. Partnership)* (1996) 48 Cal.App. 4th 182, mod. on den. of reh. Sept. 6, 1996; rev. den. Nov. 13, 1996.

This EIS/EIR ignores the fundamental lessons of those hard-fought cases, each of which was brought by those who espouse the format of CALFED's EIS/EIR. The rules of NEPA and CEQA apply to all project proponents, even proponents of environmental projects.

6. Where will the make-up water come from?

While not spelled out in the environmental document, WACO's technical review of CALFED's proposal shows that there will be a loss of water supplies to the export area totaling 500,000 to 800,000 AFA depending upon which alternative is chosen. This is too severe a consequence not to be spelled out in the EIS/EIR and analyzed in more detail than in the current document.

7. The EIS/EIR is fatally flawed in its failure to discuss in any realistic, engineering, or geographic detail the source of mitigation water supplies for the export area.

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The assumption that large blocks of water now used for agriculture will someday be released for municipal and industrial use is just that - an unsupported, contradicted and dangerous assumption.

Such an assumption was recently rejected by the Court of Appeal for the Fifth District in a case involving the adequacy of a program EIR prepared by the County of Stanislaus. In that case, the EIR considered a proposed general plan amendment involving the approval of the Diablo Grande project's specific plan for a 25-year, phased destination resort development and 5,000-unit residential unit development on 29,500 acres in Stanislaus County. Local water resources were only sufficient to support the first five years of build-out. The Court's reasoning in that case illustrates why CALFED's proposal to mitigate water shortages in the export area by hypothetical water transfers and increased surface and underground storage fails to meet CEQA requirements.

With respect to the source of water supply for build-out beyond the first five years, the EIR for the Diablo Grande project (like the CALFED EIS/EIR) included a menu of various scenarios:

The project's water supply system will involve any one or a number of the following: offsite groundwater, water purchases and exchanges, participation in water conservation projects with other water districts in exchange for water saved; utilization of wastewater effluent, both onsite and acquired offsite; development of groundwater storage facilities in Madera County; utilization of the California Aqueduct and Delta-Mendota Canal for exchange deliveries; and playing an active role in the existing trading network among California water districts south of the Delta. ...

Among the "significant unavoidable impacts" listed in the EIR was the following:

"The project would require the provision of approximately 12,880 acre-feet of water per year at buildout from an off-site source for domestic, irrigation, and for light industrial uses. A firm water supply has not yet been established beyond the first five

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years of development, although the applicant is pursuing several sources, and a water district has been created. *Until such a source is established, this is considered a significant impact.* Upon establishment of such a source, off-site unmitigated impacts may occur from the transfer and use of the water." (*Italics added.*)

... Respondent Diablo Grande candidly concedes that "there is no analysis of the potential impacts of the eventual long-term supply" of water. Respondents attempt to justify this omission by relying on the "tiering" provisions of CEQA. As we shall explain, however, a decision to "tier" environmental review does not excuse a governmental entity from complying with CEQA's mandate to prepare, or cause to be prepared, an environmental impact report on any project that may have a significant effect on the environment, with that report to include a detailed statement setting forth "[a]ll significant effects on the environment of the proposed project." (Pub. Resources Code, §§ 21100.)

In its strongly-worded opinion, the Stanislaus court chastised the EIR preparers for deferring their evaluation of the basic environmental impacts that would result from implementation of the project.

... Respondents argue that because they intend to undertake site-specific environmental review of each of the four "phases" of development, they can properly defer analysis of the environmental impacts of supplying water to the project until the actual source of that supply is selected sometime in the future. But "tiering" is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause. The County in this case could not make an informed decision on whether to adopt the Diablo Grande Specific Plan without being informed, to some reasonable degree, of the

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environmental consequences of supplying water to a 5,000-residential-unit development which has no on-site water source. [in omitted] Indeed, the environmental consequences of supplying water to this project would appear to be one of the most fundamental and general "general matters" to be addressed in a first-tier EIR. (See Pub. Resources Code, §§21068.5.) (Emphasis added)

In the present case, however, the specific plan calls for the construction of 5,000 residential units and other water-using improvements (e.g., golf courses). No matter what subsequent environmental review might take place, and no matter what additional mitigation measures might be adopted to ameliorate adverse environmental impacts on each of the four "phases" of planned development, the project was going to need water from some source or sources. To defer any analysis whatsoever of the impacts of supplying water to this project until after the adoption of the specific plan calling for the project to be built would appear to be putting the cart before the horse.

Stanislaus, 48 Cal.App.4th 198-200.

The *Stanislaus* court might as well be discussing CALFED's EIS/EIR. How can the decision makers here make an informed decision on whether to adopt the purported project without being informed of the environmental consequences to Orange County and throughout the SWP export area that would result from supplying water to the project? The project's impacts to water supplies State-wide is one of the most fundamental matters that must be addressed in the EIS/EIR - not relegated to some deferred analysis after adoption of the so-called project.

The information provided in the EIS/EIR is so incomplete, so misleading, and so broadly (and vaguely) drawn that it stultifies the objectives of the reporting process and lays out a weak and crooked framework for any subsequent environmental analysis.

To allow a programmatic EIS/EIR to be certified as adequate which admits it will not even define the project it

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studies until sometime in the future, is the legal equivalent of signing a check and leaving blank both the amount and the name of the payee. This document is not an EIS/EIR.

8. If the project is not forthrightly defined, the alternatives will not be clearly described, either.

The EIS/EIR's matrix of project descriptions, alternatives and mitigation measures is confusing to the point of being incomprehensible. The choices to be analyzed by the decision makers and the affected public would be clearer if the project were adequately described to begin with.

It follows that if the EIS/EIR drafters are incapable or unwilling to articulate a project, the mitigation measures and alternatives proposed will, likewise, be confused. As close to the EIS/EIR's description of an alternative is this example: "Because the problem being addressed by the Program and the solution are closely interrelated, the descriptions of each of the Program elements, except for the Conveyance element, do not vary among alternatives." EIS/EIR p. 2-1.

Really.

9. The EIS/EIR fails to undertake a relevant or useful cumulative impacts analysis.

One of the most critical shortcomings of this EIS/EIR is its failure to realistically appraise the cumulative impacts to water supplies in Orange County and throughout the export area resulting from increasingly stringent water quality regulations, environmental protection of watersheds, species, and habitats, forced environmental cutbacks on the use of water supplies from other watersheds, and the political reality that it is unlikely that a workable "no surprises rule" under the ESA is likely anytime soon. There is also no legislative relief in sight which would ease restrictions on additional development of local water supplies in the export area.

The same agencies that are devising this plan and drafting the EIS/EIR (United States Fish and Wildlife Services and the Department of Fish and Game) have actively protested efforts to increase development of local water resources in the WACO service area. This EIS/EIR similarly fails to address the increasingly stringent governmental regulation of wetlands areas and riparian habitat, where the local water supplies are located.

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The EIS/EIR likewise fails to consider that legal impediments to wheeling water will not be resolved any time soon, nor are water transfers in significant quantities likely to become feasible. This project, after all, is being planned to "correct" the effects of a water transfer.

It is not feasible for the WACO members to more effectively and fully manage local groundwater basins with less SWP water in the face of such restrictions. More and more groundwater basins are being designated as critical habitat for endangered species, in which groundwater pumping is restricted or prohibited. The mitigation measures that CALFED's so-called plan calls for are not feasible.

10. The project's resulting losses to the water supply in the export area will prevent water suppliers from meeting the requirements of a reliable water supply.

Under the Urban Water Management Planning Act, Water Code section 10610, et. seq., urban water suppliers that supply more than 3,000 AFA of water or serve more than 3,000 customers must periodically prepare Urban Water Management Plans and file them with the Department of Water Resources. Urban Water Management Plans must identify and quantify, to the extent practicable, the existing and planned sources of water available to the supplier over five-year increments to 20 years, or as far as data is available. Urban water suppliers are also required to describe any vulnerabilities to reliability of seasonal or climatic shortages.

The EIS/EIR ignores the existence of these filed plans which, in the SWP export area, count on continued SWP water supplies. The purported project is inconsistent with these plans. The water supply vulnerabilities created by CALFED's project as described in this EIS/EIR places local water suppliers in the position of limiting new businesses and new housing due to water shortages and supply vulnerabilities.

The project, to the extent that one is described in the EIS/EIR, impermissibly burdens local water suppliers with the responsibility to curb growth throughout the SWP export area.

Stated another way, the project's impacts to water suppliers and the responsibility for mitigating the true cost and impacts of the project, both politically and economically, is not disclosed in the document. The true cost is improperly shifted to local water suppliers, who are the entities adversely impacted

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by the purported project and least equipped to make determinations about growth control, to take actions necessary to curb growth, and to deal with the consequences of those actions.

This plan is tantamount to a no-growth declaration throughout Southern California. Under the plan, no Southern California water supplier can project long-term water supplies with any certainty. Those who rely on SWP water would be faced with the prospect of no supplemental SWP supplies during certain years. Those who rely on local water supplies would be faced with the prospect of significantly increased competition for the limited native supplies. The broader policy implications, such as family-planning, housing, and immigration are impermissibly ignored in this EIS/EIR, and impermissibly delegated to local water suppliers which lack the authority to make growth policy.

11. Water supply mitigation measures are sufficiently uncertain that they fail to meet the requirements of NEPA and CEQA.

Cities, counties and water suppliers have depended upon the continued reliability of SWP water in analyzing the availability of water supplies to serve new projects pursuant to the requirements of Public Resources Code section 21151.9 and Water Code sections 10910 and 10911.

This purported project will result in a substantial diminution of SWP water exports upon which all plans for local supply reliability and quality depend. According to these existing plans, a significant diminution of SWP water supplies will result in inadequate local water supplies to serve the existing and planned water demands in the WACO service area. If these resulting impacts are not fully mitigated as part of the proposed CALFED project, there will be significant adverse public health, economic, and environmental consequences throughout the WACO service area.

The law is clear on a project proponent's obligations to prepare environmental documentation. The project, its environmental effects, its alternatives, and mitigation measures to offset the adverse environmental effects must be spelled out in the EIR/EIR on the project which is to be approved. This is the rule even for tiered EIRs. Information and analysis about the source of the make-up water cannot be deferred until some future tier. The question of where the makeup water comes from must be discussed in the document supporting the initial approval of the project. The affected public and the decision-makers must be informed of the full

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implications of the adverse impacts of the project. Deferral of such basic issues to some time after approval of a project is simply impermissible.

- B. The EIS/EIR's project description misleads the reader by avoiding a forthright discussion as to its controversial aspects, particularly its adverse health impacts, the magnitude of its financial costs, and quality of life aspects.

Even with a tiered or program EIS/EIR, "piecemealing" or "bitesizing" of an environmental study is improper. Yet on all of the key elements of the purported CALFED project (such as the project description and its impacts, alternatives and mitigation measures), that is what is being done in this EIS/EIR. The project's incomplete and misleading description, coupled with its impermissible bite-sizing, results in fatal confusion as to which proposed impact-offsetting activities are mitigation measures, which are the project alternatives, and which is the project.

The EIS/EIR's project description misleads the reader by understating this project's controversial aspects, particularly its adverse health impacts, the magnitude of its financial costs and the degradation in aspects of quality of life, including aesthetics, which will result from the project's impairment of water quantity and quality in the export areas.

The EIS/EIR fails to undertake the requisite analysis of the risks to public health in the export area. The EIS/EIR impermissibly delays a health risks analysis until some non-specific time in the future, even though the document discloses that there will be a public health risk associated with any delay of implementation of water quality improvements following commencement of ecological enhancements.

The EIS/EIR must address the seriousness of the risks to public health in the export area of both the project and the various alternatives (in the absence of self-generated mitigation measures). The study should quantify the risks: how many people are projected to be at increased risk of heart failure from the project's increase in the total dissolved solids (tds) of the water supply? What is the increased cancer risk from increases in bromide disinfection byproduct formation? How many people in the export area are projected to become ill from the source of supply, due to the project's increases in tds and bromide? How many employee sick days will result? How many children will miss school, and how many missed school days will there be annually?

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Without such an analysis, a decision-maker cannot make an informed decision about whether to proceed to approve this project, and if so, how to mitigate its adverse impacts. Likewise, the affected public is denied a meaningful opportunity to comment on the EIS/EIR.

- C. The EIS/EIR impermissibly defers the task of addressing with particularity how source water quality and reliability will be maintained during implementation of the proposed ecosystem restoration project.

After a frank admission in the EIS/EIR that questions about source reliability and quality will not be addressed until later, the public is told only that the ecosystem of the Bay-Delta will be restored, water quality in the Bay-Delta will be improved for the habitat, the Delta levee system will be improved, and that somehow, adverse impacts from these actions will be accomplished through water transfers, storage, watershed and conveyance elements. The public is not told when water quality improvements will be forthcoming, who will be responsible for paying for the improvements, where make-up water will be coming from, and what governance structures and legal authority will be created to see that the mitigation measures to protect humans, agricultural resources, and the environment in the export areas are in place and effective.

This EIS/EIR (and certainly the accompanying press releases) fails to inform the public and decision makers that to restore the Bay-Delta, in effect creating a huge recreational and nature preserve as proposed: (1) requires the changed operation of both the Central Valley Project and the SWP in a manner which will increase public health risks for an unspecified duration; (2) assumes in the face of overwhelming evidence to the contrary and without any basis, that water transfers will make up for any supply shortfall resulting from the project; (3) adversely impacts the ability to continue operation of pre-existing habitat plans in the export area; (4) will become even more restrictive and costly because the ESA mandates that if any newly identified species requires further export reductions or quality degradation to insure the continued existence of the species, this plan will be modified to accommodate the new species, irrespective of the consequences to the export area. The EIS/EIR also fails to disclose that the enforcement of the ESA, and the Clean Water Act and other environmental laws in the export area severely inhibit the implementation of groundwater storage and conjunctive use activities in the magnitude needed to offset project impacts, as proposed by the drafters of the EIS/EIR.

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The EIS/EIR drafters may not simply decree that some unspecified water transfers from an undisclosed place, at an unspecified time, from an unidentified previous use will make up for the water which will be dedicated to their proposed project of ecological restoration of the Bay-Delta Estuary. Like the EIR preparers in Stanislaus, the EIS/EIR must state how, when, and where that water will come from to make up the deficit in supply to the export area. Nothing less will do.

To rely on the possibility of a series of temporary transfers will not do, either. Any new water transfer can be undertaken only temporarily, if at all, and with full-scale environmental challenges by opponents of such a project.

Temporary transfers are not suitable water supply sources upon which to build municipal or any other water supply systems, and certainly cannot make up for lost SWP water from either a water quality or reliability perspective. Hence, any reliance on this EIS/EIR for the proposition that water transfers will serve to mitigate the water deficiencies resulting from the adoption of any of the alternatives, or the project being proposed, is unsupportable.

Thus, the assumption in this EIS/EIR that certain key mitigation measures and alternatives and upon which this EIS/EIR relies to make up for supply shortfalls and quality deficiencies of the project, is faulty.

D. The discussion of alternatives and mitigation measures is too uncertain to meet CEQA and NEPA requirements.

1. Mitigation measures which are infeasible do not count.

The EIS/EIR should include only those mitigation measures which are feasible. Both CEQA and NEPA require that proposed mitigation measures be feasible. See, CEQA Guidelines §15151 which states that "an evaluation of environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of what is reasonably feasible".

A mitigation measure is considered feasible if it is capable of being accomplished in a successful manner within a reasonable period of time, taking into consideration economic, environmental, legal, social, and technological factors.

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Implementation of mitigation measures (either those called out in the EIS/EIR, or those which are implied), may be impossible because their implementation would violate state and federal species protection laws and existing mitigation plans in the export area. Additionally, the entities responsible for carrying out the purported project have no authority to compel or otherwise carry out the water transfers and water production projects necessary to mitigate the adverse impacts of the project.

- (a) Hypothetical, future "water transfers" as a mitigation measure is an illusory offset

Mitigation measures such as water transfers, reduction in agricultural use, conservation, reliance on recycled water, and increased reliance on local resources, conjunctive use and groundwater storage are not spelled out, and are illusory water sources, at best.

The drafters of this EIS/EIR advance the proposition throughout their discussions about mitigation measures and alternatives, that water transfers - - presumably from unspecified agricultural areas in the state - - will serve to offset reductions in exports from the Bay-Delta, and somehow mitigate for the adverse effects of the proposed project. This proposition is, at best, naive, but more accurately can be described as cynical.

This is a "pie-in-the-sky" concept. A transfer is a transfer, and all transfers have been under relentless attack by environmental groups in recent years. The water transfers implemented by the SWP and the Central Valley Project are being redesigned and gutted in this CALFED process, just as Los Angeles' Owens Valley Project, and its Mono Lake Project, have suffered a similar fate.

The assumption that large blocks of water now used for agriculture will someday be released for municipal and industrial use is advanced in the EIS/EIR without any analysis of its feasibility. Transfers of water away from agricultural use cannot be lawfully implemented without the consensus of the agricultural landowners and water rights holders or acquisition of the water rights. Yet, the EIS/EIR fails to analyze the lead agencies' ability to effect such measures. As is painfully apparent, the mitigation measures proposed in the EIS/EIR cannot be considered feasible, or even viable, given approved CEQA and NEPA criteria.

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Similarly, the EIS/EIR must analyze the adverse impacts of the mitigation measures. See CEQA Guidelines: §15370, and NEPA guidelines, 40 CFR §1502.16. The EIS/EIR fails to analyze the impacts of taking water away from agriculture, an important economic activity, in order to apply it to "habitat restoration" purposes.

2. Infeasible alternatives do not count, either.

To the extent that the EIS/EIR discussions of future make-up water are intended to constitute project alternatives instead of mitigation measures, they likewise fail as legally inadequate. Both NEPA and CEQA require that the alternatives discussed be reasonable alternatives. See, 40 CFR §1502.14 Alternatives, "the EIS shall "(a) rigorously explore and objectively evaluate all reasonable alternatives." The EIS is always evaluated under the "rule of reason".

The test under CEQA is whether the alternative is feasible. See *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.* (1997) 127 F.3d 1142 [the range of alternatives under CEQA is guided by the doctrine of feasibility]; *Inyo County v. City of Los Angeles*, (1981) 177 Cal.Rptr. 479 [held: the second EIR did not comply with the requirements of CEQA because it did not include genuine no-project alternatives, its project description impermissibly removed essential elements from matters required to be considered, and alternatives were not tied to a consistently viewed project].

IV. The adverse environmental impacts of both the alternatives and mitigation measures must be analyzed as well.

CEQA and NEPA require that both mitigation measures and project alternatives must be analyzed for their own adverse impacts upon implementation.

The EIS/EIR must analyze the adverse impacts of the mitigation measures proposed to offset the adverse impacts of the projects. See CEQA Guidelines: §15370, and NEPA guidelines, 40 CFR §1502.16. NEPA also requires that the environmental impacts in the area affected by each alternative be described. See 40 CFR 1502.15.

The EIS/EIR fails to identify or evaluate the environmental consequences that may be anticipated from water transfers and increased development of local water necessary to offset the adverse impacts of the purported project, such as impairment to established riparian habitats.

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V. The CALFED process is an improper delegation of duties and of questionable enforceability.

The CALFED process is a committee-developed plan for water rights restrictions, re-design and re-operation of the SWP and CVP, and environmental protection plan, which attempts to subordinate the rule-making and exercise of discretion of existing public agencies empowered to make such decisions, and to authorize such actions. What is the basis of CALFED's authority to proceed in this manner? By what statutory authority have state agencies purportedly delegated their fact-finding and deliberative processes to CALFED? By what Congressional authority have federal agencies delegated their own rule-making and fact-finding authority to a committee? To what extent is such authority lawfully delegated? The EIS/EIR must disclose the legal authority of the project proponents to implement such an arrangement.

The EIS/EIR frankly admits that the "governance" element of this program has not been prepared. Basic questions are unanswered in the EIS/EIR. Who is in charge of implementing the project? Which person, committee, agency, or task force has the power to enforce the necessary mitigation measures? For that matter, has either the U.S. Congress or the California Legislature empowered the CALFED committee to govern on such an important policy issue? Under what authority? Is this an improper usurpation of power? May the California Department of Water Resources properly delegate its planning, design, engineering, and water supply functions to this committee? Will the authority of the State Water Resources Control Board be subsumed by CALFED?

Have these jurisdictional questions been examined? By whom? A written analysis needs to be prepared and incorporated into this EIS/EIR.

If a property owner or public agency determines that its property has been inversely condemned by implementation of the project, who are the responsible defendants?

Should a committee have any more authority to plan than its individual agencies? Are the individuals participating in the CALFED meetings jointly and severally responsible for damages arising from the adverse impacts to people's health due to the reduction in water quality?

Under what authority is a record of decision being prepared, and why? Has anyone examined or opined on these, and the related

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questions before CALFED embarked on this process? If so, any such inquiry must be made available to the public for review and comment, so that any assumptions relied on can be examined.

VI. Conclusion.

The EIS/EIR so completely fails to satisfy the requirements of CEQA and NEPA that it is unrecognizable as an environmental impact statement or report. For all of the reasons discussed above, WACO urges that the EIS/EIR on the purported project be rejected.

Respectively submitted,

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